IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA
APPELLEE,

VS. NO. 33835

GLORIA JEAN WILLETT
APPELLANT,

REPLY BRIEF

In conformance with Rule 10(c) of the West Virginia Rules of Criminal Procedure, the Appellant humbly files this Reply to the State's brief.

The issue before this Court is whether the lower court followed the appropriate rules and applied the proper standards to the Appellant's 404(b), or the McGinnis hearing. This hearing lead to the admission of the trial testimony of Alan Reed, who claimed he had bought drugs from Appellant on numerous, but unidentified times in the past.

INTRODUCTION:

The Appellant contends that she has Due Process rights and the Rights of Confrontation protected under the Constitution of the United States and of the State of West Virginia, that attached at her 404(b) hearing: i.e. the Appellant contends that the State failed to overcome her presumption of innocense and failed to prove the alleged "other crimes" or "wrongs" by a preponderance of the evidence and that this failure is a Due Process Rights violation and the use of evidence presented outside the hearing to decide this issue is a violation of the Confrontation rights of the Appellant.

The State's brief makes clear the State has not, as it cannot not, offer any evidence or examples of admissible evidence which were offered at the 404(b) hearing that would establish

that the lower court judge had admissible evidence before him to prove by a preponderance of the evidence other crimes or wrongs as claimed by Alan Reed. Instead, the State goes into a list of inadmissible, improper arguments that are not part of the July 31, 2006, hearing record.

The entire discussion by the State of the 404(b) hearing can be quickly replicated as follows:

"At the July 31, 2006, hearing the Honorable John A. Hutchison heard the evidence of state concerning the distribution of controlled substances by Defendant at an in camera hearing required by State v. McGinnis, 455 S.E.2d 516 (W.Va.1994). The state called Reed who testified and was subjected to cross examination. The defense called Defendant who testified at that hearing as well as Defendant's spouse. Judge Hutchison weighed the evidence and after initially taking the matter under advisement determined that the state had made the requisite showing that by a preponderance of the evidence the defendant had delivered controlled substances to Reed, that the evidence was relevant W.V.R.E. 402 and that the probative value of the evidence outweighed its prejudicial effect W.V.R.E. 403. State v. Smith, 438 S.E. 2d 554 (W.Va. 1993). Judge Hutchison subsequently issued a ruling at the final pre-trial hearing."

This paragraph is the entire discussion by the State on the July 31, 2006, 404(b) hearing. The State offers not a single quote from the 404(b) hearing of July 31 to support the claim that the Appellant received a meaningful 404(b) hearing at trial.

The entire presentation of the State consists of two arguments: (1) This Court should be tainted by inadmissible evidence of hearsay offered up at trial on August 8, 2006, and well after the 404(b) hearing and ruling and (2) the testimony of Alan Reed was only a small part of the evidence offered and that the other evidence was so overwhelming, the testimony of Alan Reed did not affect the outcome of the trial.

Both arguments by the State make a mockery of the whole 404(b) hearing process.

I. THE STATE'S FIRST ARGUMENT: (LABELED "INACCURACIES AND OMISSIONS")

To justify the ruling of the lower court at the July 31, 2006, hearing, the State offers in

Section 1 titled "Inaccuracies and Omissions" the August 8, 2006, trial testimony of either Alan Reed or his hearsay testimony. In the State's brief, four paragraphs refer to Alan Reed; two anonymous sources, (two paragraphs), and one identified source of a Lilly, who did not testify at trial because he could not be located by the police. This supposedly justified the ruling of the lower court from the week before.

This Court should be mindful in dealing with some of the matters set out in the State's brief as to whether it was proper evidence. Judge Hutchison rules as follows: (TR-24, Aug.8), in dealing with the objection of counsel, he says "I've told these folks its not evidence. I have already told them the only purpose is to explain why we were here. It can't be considered as evidence. It's not going to be considered for the truth, just why we are here." Of course, the jury heard this so called "background information." Now the State wants to taint this Court with my referring to this evidence without the precautional instruction.

A. The State's brief "Omissions or Inaccuracies." Paragraph 2 reads as follows: "the Beckley Police Department received a tip indicating the defendant had been engaged in drug trafficking." (TR-22). "The tip was from Alan Reed."

The actual testimony is quoted from the trial transcript (TR-22) "initially, my office received a phone call, a partner of mine did from an inmate at the Southern Regional Jail named Alan Reed. He called Det. Bailey and gave him some information concerning the Willett's and the house there on Quarry Street." This hearsay makes no mention that this involved "drug trafficking."

B. "Det. M.G. Montgomery received another phone call from an anonymous source who was a neighbor of the Quarry Street residence. The caller went into detail about observed traffic coming to the house. (TR-25). (This is hearsay from an unidentified source and doesn't

even refer to it as "drug trafficking.")

C. Paragraph 4, Page 2, "on May 12, 205 another complaint came to Beckley Police." (No source identified).

D. Paragraph 3, Page 2, "Reed was introduced to defendant as a supplier of narcotics through Defendant's brother, Gary Lilly." (TR-125). This is a quote from the trial testimony of Alan Reed. The State makes no mention as to why Reed's statements are self authenticating. "The State then claims the State diligently searched for Lilly but could not located. Defendant has provided the case agents with a statement confirming Reed's version of how Reed and the defendant had met," which was not admitted into evidence and is not part of the record.

In short, the State either quotes Alan Reed directly or indirectly and makes reference to unnamed, anonymous informants beyond the capability of cross examination of the defendant. This testimony cited by the State was offered August 8, after the judge had already made his ruling of July 31 that Reed was to testify. Much of which was offered only as background information and not for the truth of any of the matter asserted.

Much of the discussion that was raised in the State's brief involved the search warrant. Whether the search warrant background offers enough circumstances to be a valid search warrant is a different issue than a hearing involving 404(b) or other crimes evidence. Appellant contends her 404(b) hearing should not be tainted by search warrant speculations.

The State also throws in for good measure that the defendant was not indicted and charged or that there was even a 404(b) hearing on her use of having two doctors, one in Florida and one in West Virginia. 60A-4-410 Code of West Virginia reads, "It is unlawful for a patient, with the intent to deceive to obtain a prescription for a controlled substance, to withhold information from a practitioner that the patient has obtained a prescription for a controlled

substance of a similar therapeutic use in a concurrent time period from another practitioner." The State has never contended that having two doctors is illegal. The Appellant has never been charged with the intent to deceive or obtain a prescription of a controlled substance by withholding any information. Yes, Gloria Willett had two doctors. What she told them has never been something her testimony has ever been challenged.

In short, the State makes no attempt to claim Appellant had a meaningful 404(b) hearing. The State had to overcome the presumption of innocense by a preponderance of the evidence and the State fails to point to anything at the hearing to prove this. Merely having a hearing is not Due Process, unless it is a meaningful hearing.

II. STATE'S SECOND ARGUMENT: ALAN REED WAS NOT THE STATE'S "STAR WITNESS"

The State, in its brief, Page 5, Paragraph 3, "the testimony (of Reed) went primarily to the element of intent to deliver, which the State was required to prove." The Appellant agrees that this was the element the State had to prove.

On Page 5 of the brief, the State claims "the State made very sparing use of Reed's testimony, which encompasses a total of 13 pages of direct and redirect testimony out of 384 total pages." The Appellant contends that it should have been zero pages. As it was, Alan Reed's testimony begins on TR-120 and concludes on TR-170. All of the cross examination would have been totally unnecessary had the lower court excluded the evidence.

In the State's brief, the only actual testimony offered was either anonymous sources or Alan Reed's. The State contends that the following are such obvious criminal activities that Alan Reed's testimony was overshadowed by their obvious criminal acts: Appellant disagrees.

A. The defendant had two doctors, one in Florida and one in West Virginia.

The State contends this is "doctor shopping." There never was a hearing on it. There was never a motion to claim that this was doctor shopping nor has the State established that the elements as set out in the code have been met. Having two doctors is not a criminal activity. No doctors testified.

B. "The location of some the pills was under a mattress (TR-174)." The State forgets to tell this court that Richard Willett testified that the pistol belonged to him and that the pills found under the mattress belonged to him. (TR-235). All charges were dropped against Richard Willett. The State could not identify where Richard Willett's pills were found.

C. The State claims that the defendant testified that "she and her spouse were of limited means. (TR-313-314)." (Being poor is apparently a criminal activity in the minds of the State).

D. "She was intending to retire." (Apparently retiring is now criminal activity).

E. Had undergone back surgery. (Apparently back surgery is an indication of criminal activity).

F. Her spouse was in poor health. (Apparently the State contends that anything less than perfect health is criminal).

G. He made repeated trips from Florida to work on their house in West Virginia. (Apparently interstate commerce is now a violation of law).

H. Defendant's possessed a credit card but refused to use it, instead used cash. (The State may think using cash is Un-American, but it is not criminal).

I. Rarely rented a motel room. (This not surprising in that they owned a house).

The State is totally misleading in that all 3,000 pills belonged to Gloria Willett. A number of the pills were her husband's, Richard Willett. No one at the trial contended then or now that

the pills were illegally obtained.

But for the testimony of Alan Reed, the testimony of Gloria Willett, that she hoarded these drugs because she was in the process of moving and was afraid that her prescription would be cut off; would have normally raised a reasonable doubt.

If one removes from the transcript all of the testimony of Alan Reed as defense contends, removes all mention of anonymous and unnamed sources, the State cannot point to a single unlawful act that the Appellant committed. Possessing a large number of pills is not illegal, only possessing them with the intent to deliver them is illegal. If she had delivered the pills as contended by Alan Reed, she wouldn't have had the pills in her possession.

In conclusion, this Court can either allow 404(b) or McGinnis hearings to be nothing but an irrelevant hearing before trial or this Court can make 404(b) hearings to be required to have some due process and substantive value.

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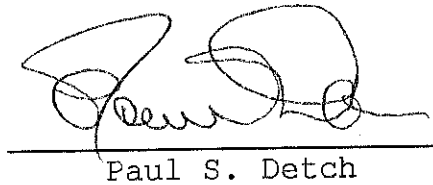
CERTIFICATE OF SERVICE

I, Paul S. Detch, hereby certify that a true and exact copy of the foregoing REPLY BRIEF was served upon Tom Truman, APA, Raleigh County Courthouse, 112 N. Heber Street, Beckley, W.Va. 25801 by mailing a true and exact copy by regular United States mail, postage paid on this 24 day of October, 2008.



Paul S. Detch